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Supreme Court, U.S.
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No. 02-1637

In The
Supreme Court of the United States

JERRY KATE BAZOR, Widow of BEN BAZOR,

Petitioner,

v.

BOOMTOWN BELLE CASINO and LOUISIANA WORKERS' COMPENSATION CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

Respondent, Louisiana Workers' Compensation Corporation, is not a publicly traded corporation. It is a mutual insurance company.

Respondent, Boomtown Belle Casino, is a limited partnership.

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COUNTER STATEMENT OF THE CASE

To clarify the Statement of the Case submitted by the petitioner, it must be specifically noted that Mr. Ben Bazor was hired by, and at all times pertinent, employed by the Boomtown Belle Casino. The construction of the Casino boat was contracted to and performed by Avondale Shipyards in Westwego, Louisiana and, the construction of the dock area, was performed by an outside contractor hired by Boomtown Belle Casino for that purpose. Likewise, the tent, which was to be used as a temporary shelter to house Casino patrons, once the Casino boat was in place, was likewise rented from and erected by an outside contractor.

The duties of Mr. Bazor, included preparing the vessel for gambling operations, but only insofar as that preparation concerned the installation of wiring for the slot machines, data processing equipment and security cameras, and a general clean-up of the boat to expedite its delivery. No one from the Boomtown Belle Casino, including Mr. Bazor, was involved in the actual construction of the boat.

The petitioner incorrectly states at page four of the Petition for Certiorari that Mr. Bazor "supervised the construction of the dock and vessel ramp". There is no evidence whatsoever that Mr. Bazor supervised any aspect of the construction of the vessel or that any work at all was performed on the vessel ramp. This attempted expansion of Mr. Bazor's work duties is incorrect and wholly unsubstantiated by the facts since the construction of the dock and adjoining buildings was still underway by an outside contractor.

Additionally, the record clearly shows that Mr. Bazor did not work "15 hour days". After the 4th of July holiday,

a mere nine days before the incident sued upon, the evidence shows that Mr. Bazor began working longer hours, approximately 10 to 12 hours per day.

REASONS FOR DENYING THE WRIT

Respondents, through undersigned counsel respectfully request that this Honorable Court deny the Writ of Certiorari. The United States Fifth Circuit Court of Appeals, in its Decision below, followed the express wording of 33 U.S.C. § 902(3)(B) which denies status under the Act to "individuals *employed* by a club, camp, recreational operation, restaurant, museum or retail outlet" (emphasis added). It is unquestioned that Mr. Bazor was employed by the recreational operation, namely, Boomtown Belle Casino. Hence, the inquiry must end at that point since Mr. Bazor is excluded under the express provisions of the Longshore and Harbor Workers' Compensation Act.

Even if status were found in this matter there is no basis for finding a determination of situs under 33 U.S.C. § 903(a) since the adjoining area where the incident occurred was not one "customarily used" for maritime activity.

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CORRECTLY FOUND THAT THE PETITIONER FAILED TO MEET THE STATUS REQUIREMENT FOR COVERAGE UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

The Longshore and Harbor Workers' Compensation Act at 33 U.S.C. § 902(3)(B) specifically excludes from

coverage "individuals employed by a club, camp, recreational operation, restaurant, museum or retail outlet". Since the plain wording of the statute excludes from coverage those individuals "employed by" recreational operations, the holding of the Fifth Circuit in this regard is correct.

A. Petitioner failed to timely raise the issue of coverage under a State Workers' Compensation Act; therefore, that argument is deemed to be waived.

The record of the trial in this matter, as well as the Briefs to the Benefits Review Board and the Briefs filed with the United States Fifth Circuit, Court of Appeals, are devoid of any reference by petitioners to any remedies under the State Workers' Compensation Act. Petitioner never prosecuted a claim under the Louisiana Workers Compensation Act (LA. REV. STAT. ANN. 23:1021 et seq.) hence the existence of any right or remedy under that statute has never been adjudicated. This argument was raised for the first time during oral arguments before the United States Fifth Circuit, Court of Appeals. In order for an issue to be considered on appeal that issue must first be raised below. *King v. Director, OWCP*, 904 F.2d 17 (9th Cir. 1990). Hence, any issue of coverage under the State Workers' Compensation Act was not properly before the United States Fifth Circuit, Court of Appeals and is not properly before this Court.

Additionally, the petitioner is incorrect in her assertion that if the decision of the Court of Appeals is upheld, claimant and those similarly situated would be left without a remedy. The law of Louisiana contemplates a tort remedy to claimants whose claims fall outside of any

compensation scheme, whether it is the Longshore and Harbor Workers' Compensation Act or the Louisiana Workers' Compensation Act. More specifically, in situations such as Mr. Bazor's, where he is not covered by the Longshore and Harbor Workers' Compensation Act, if a state workers' compensation claim were to be later denied (although no such claim has ever been made) on the basis that the injury is not covered by the Louisiana Workers' Compensation Act, then claimant herein would have a tort remedy available. *Hunt v. Womack*, 616 So.2d 759 (La. App. 1st Cir. 1993) writ den. 623 So.2d 1309 (La. 1993) and *Ellis v. Normal Life of Louisiana*, 93-1009 (La. App. 5th Cir. 5/31/94) (638 So.2d 422).

B. Congress intended that employees of recreational operations are to be excluded from coverage under the Longshore and Harbor Workers' Compensation Act.

Contrary to the assertion of petitioner herein, the fundamental basis for the holding of the United States Fifth Circuit, Court of Appeals in this matter was the plain wording of the statute. The *Green v. Vermilion Corp.*, 144 F.3d 332 (5th Cir. 1998) case was cited by the Court as an example of the exclusion of coverage being granted to an employee of a corporation that was not a club, camp or recreational operation. In *Green,* the Vermilion Corporation had numerous interests, other than the operation of a hunting camp, but employed Mr. Green to work at its camp as a cook. Therefore, the Court of Appeals held that since Mr. Green worked at a club or camp he was excluded from coverage under the Longshore and Harbor Workers' Compensation Act.

A cursory review of the Opinion in this matter and the *Green* Opinion shows that the critical element of the identity of the employer is the marked difference between those two Decisions. In both cases the Court acknowledged that the nature of the employing entity, not the nature of the duty a given employee performs, is the initial inquiry. In the Decision below the Court noted that the legislative history of § 902(3)(B) also allows for the exclusion of employees from coverage under the Longshore and Harbor Workers Compensation Act, "because of the nature of the employing enterprise as opposed to the exclusions in paragraph 2(3)(A), which are based upon the nature of the work which the employee is performing") H.R. Rep. 98-570(I), 1984 U.S.C.C.A.N. at 2737.

Since *Green* can be distinguished from the case at bar, the *Green* Decision has no impact on coverage for an individual directly employed by the recreational operation nor upon any individual who may be engaged in the construction of a camp, club, restaurant or recreational operation, as Mr. Green was not engaged in such activities. Contrary to the innuendo of petitioner herein, the recreational operation was the employer of Mr. Bazor, namely, the Boomtown Belle Casino. Notwithstanding the identity of his employer, the Court of Appeals specifically found that all of Mr. Bazor's activities were in furtherance of the Casino operations. Namely, the maintaining of the Boomtown facility, wiring for slot machines, data processing and security systems on the Casino boat and cleaning the boat to expedite its delivery, all furthered the business interests of the Casino operation. Likewise, contrary to the assertion of petitioner herein, the exclusion under which coverage under the Longshore and Harbor Workers' Compensation Act was denied to petitioner herein extends

only to employees of the recreational operation. If Mr. Bazor had been employed by Avondale Shipyard or by the contractor who was constructing the Casino facility, the Courts may very well have determined that he was a covered employee depending on the nature of his employment duties. Thus, the Decision by the Fifth Circuit, Court of Appeals does nothing more than implement the express wording of the statute by removing from the coverage afforded under the Longshore and Harbor Workers' Compensation Act those individuals employed by a club, camp, restaurant, museum or recreational operation.

1. The Fifth Circuit's interpretation of § 902(3)(B) has no effect whatsoever on § 902(3)(F).

The provisions of 33 U.S.C. § 903(F) exclude from coverage under the Longshore and Harbor Workers' Compensation Act individuals employed to build, repair or dismantle any recreational vessel under 65 feet in length. As noted above, § 902(3)(B) turns on the nature of the employing entity and not the nature of the duties the employee performs. Section 902(3)(F) turns on the nature of the employee's duties and not the nature of the employing entity. These two exclusions are clearly targeted at two different types of employees. Additionally, the Casino vessel involved would in no way qualify under the provisions of § 902(3)(F). It must be again emphasized that Mr. Bazor did not participate in the construction of the vessel itself; rather his involvement was limited to only those aspects, which facilitated the Casino operations on the vessel. Hence, any comparison between the provisions of § 902(3)(F) and the facts of the instant case are irrelevant. Moreover, as with the argument concerning the potential

claim under the Louisiana Workers' Compensation Act, the argument which now, for the first time contests the status of the Boomtown Belle Casino as a "recreational operation", was never briefed or argued by the plaintiffs prior to the Petition for Certiorari. Hence, that argument should not be heard at this late date.

2. The decision of the Fifth Circuit Court of Appeals does not conflict with this Court's decision in *Caputo*.

As outlined previously, the statute in § 902(3)(B), carves out an exception of coverage based upon the nature of the employing entity. The provisions of § 902(3)(B) were added to the Act in the 1984 amendments to the Longshore and Harbor Workers Act, seven years after the decision in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). Moreover the *Caputo* case recognized that coverage under the act primarily focuses upon "maritime employment". The Longshore and Harbor Workers Compensation Act is not intended to cover anyone who "breathes salt air", rather, only those who are engaged in loading, unloading, repairing or building a vessel. See also *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S. Ct. 1421 (1985). This statutory exception to coverage for employees of recreational operations is wholly consistent with the intent of the Longshore and Harbor Workers' Compensation Act and with this Court's interpretation of that Act to provide coverage to those workers engaged in "maritime employment". 33 U.S.C. § 902(3). The claimant argues that the Decision of the Fifth Circuit is "contrary to the plain language of the LHWCA". Brief p. 14. In fact, the Decision of the Fifth Circuit, Court of Appeals is wholly consistent with the plain language of the LHWCA and carries forth the intent of the Act as expressly outlined in

that provision of the Act. When there is no dispute concerning the plain meaning of the statute, the statute should be implemented without regard to the legislative intent. In this case there was, and is no dispute regarding the plain meaning of § 902(3)(B) and, as such, the provisions of that statute should be carried forth by this Court upholding the Decision of the United States Fifth Circuit, Court of Appeals that the decedent, Mr. Ben Bazor, was not covered by the LHWCA at the time of his accident.

II. THE FIFTH CIRCUIT COURT OF APPEALS APPROPRIATELY APPLIED THE LAW OF "SITUS".

The jurisdictional element of situs is found in 33 U.S.C. § 903(a), which states:

> "Except as otherwise provided in this Section, compensation shall be payable under this Chapter in respect of disability or death of any employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)."

As with the statutory provisions on status, the clear wording of the statute requires that the area where the injury occurs be "used" by an employer in loading, unloading, repairing, dismantling, or building a vessel. A cursory review of the facts in this case shows that Mr. Bazor was not injured upon the navigable waters of the United States nor upon any pier, wharf, dry dock, terminal, building way or marine railway. Recall that Mr. Bazor's CVA occurred in

the temporary tent structure erected in the parking lot approximately one hundred feet from the Harvey Canal. Thus by definition, the facts show that Mr. Bazor's injury occurred in another "adjoining area". Whether an adjoining area is an appropriate situs for coverage under the Longshore and Harbor Workers' Compensation Act is determined by its use at the time of the injury. See *Nelson v. Guy F. Adkins Construction Co.*, 29 BRBS 39, 41 (1995). At the time of Mr. Bazor's injury the area in which he was situated was contemplated for future use for the dockside Casino but at no time was that contemplated area to be used for any of the enumerated purposes set forth in § 903(a). The clear wording of the statute requires that the adjoining area have an actual and current relationship to maritime activity. Since such is not the case the tent area cannot constitute an "adjoining area" as contemplated by § 903(a).

The *Hurston* and *Fleischmann* cases cited by petitioner to establish the alleged "conflict" between the Circuit Courts are inapposite since the structures where the claimant was injured in both cases was deemed to be a pier, not an adjoining area.

The interpretation by the United States Fifth Circuit, Court of Appeals correctly interprets the phrase "customarily used" and recognizes the temporal requirement of that phrase. For this reason alone the claimant has failed to establish an appropriate situs to confer jurisdiction under the Longshore and Harbor Workers' Compensation Act.

A. The Fifth Circuit's interpretation of the words "customarily used" is in accord with other circuit decisions, the reasoning of the United States Supreme Court and the legislative purpose underlying 33 U.S.C. § 903(a).

Contrary to claimant's assertion, the injury did not occur at a dock or a shipyard. The injury and resulting disability occurred at an area which was contemplated for future use of the recreational operation. As noted by the Court in *Sidwell v. Express Containers Services, Inc.*, 71 F.3d 1134 (4th Cir. 1995), "the key is the functional relationship of the employee's activity to maritime transportation". No serious claim can be made that the use of the Casino vessel has any "transportation function", the vessels are used simply because state law, at that time, required that the vessels move away from the dock while gambling is in process. The passengers embark and disembark from the vessel at the same location. Likewise, there is no transportation of cargo involved in any of these "voyages".

As the Court in *Sidwell* noted:

> "Thus an "other adjoining area" as to which coverage extends must be *like* a pier, wharf, dry dock, terminal, building way, or marine railway. Each of the enumerated "areas" is a discrete structure or facility, the very *raison d'etre* of which is its use in connection with navigable waters. Therefore, in order for an area to constitute an "other area" under the statute, it must be a discrete shore side structure or facility. And the asserted "area" must be "customarily used by an employer in loading, unloading, preparing,

dismantling, or building a vessel" as the statute provides."

Contrary to claimant's assertion, the Fifth Circuit's interpretation of this statute is not in any fashion misguided or "narrow", it is simply the most logical interpretation of the plain language of the statute.

B. The focus of this litigation is the cardiovascular accident sustained by Mr. Bazor.

There is no question that that CVA occurred in the tent structure located in the parking lot at the Boomtown facility. Since there can be no claim under the Longshore and Harbor Workers Compensation Act until a disability occurs, that event formed the beginning of this claim. There is no competent medical evidence whatsoever of any type of "cumulative aspect of petitioner's injury". Claimant scrupulously avoided any medical testimony from Mr. Bazor's treating physicians. Hence, without any competent medical evidence before the Court to support the alleged "cumulative aspect" of this claim, this argument is absolutely without merit.

Claimant asserts that the Appellate Court has imposed a "temporal dimension" to the situs requirement. What the Court of Appeals has done is implement the clear wording of the statute, which through the use of the phrase "customarily used", must have a temporal element.

The "zone of special danger" is also a new theory, not presented to the Administrative Law Judge, the Benefits Review Board or the United States Court of Appeals for the Fifth Circuit. The "zone of special danger" theory is most often used in cases arising under the Defense Bases

Act or the Federal Employees Compensation Act. Even if that theory could be applied to the instant case, there is no evidence whatsoever that Mr. Bazor's workplace was uniquely dangerous. Interestingly, by the eleventh hour invocation of the "cumulative injury" claim and the "zone of special danger" doctrine, claimant seems to be tacitly admitting that the tent area, where Mr. Bazor suffered his CVA, was not an "adjoining area" as contemplated by § 903(a), hence that the injury did not occur on a covered situs.

Clearly, under any construction of the facts established in this matter, the injury did not occur on a covered situs. Therefore the Fifth Circuit's decision, finding that there was no maritime situs through the invocation of the plain language of § 903(a) should be affirmed in all respects.

CONCLUSION

THEREFORE, respondents Boomtown Belle Casino and Louisiana Workers Compensation Corporation requests this Honorable Court DENY the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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